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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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DENNIS E. GREENMAN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether petitioner, who fully performed his part of a written plea bargain, pleaded guilty, made restitution to the extent of his personal assets ($1.7 million), and waived his self-incrimination privilege, may obtain specific performance of the government's agreement to "make no recommendation as to the sentence," or whether petitioner's sole remedy for the government's breach of the agreement is to replead?

2. Whether petitioner was accorded due process by a sentencing court which said it had decided upon sentence prior to reading anything from or hearing petitioner or his counsel?

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No. 83____

DENNIS E. GREENMAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of petitioner's request for specific performance of a written Plea Agreement

and affirming the sentence of 10 years in jail and a fine of $10,000 for conviction on a plea of guilty to an information in one count charging violation of 18 U.S.C. § 2314, entered against him in the United States District Court for the Middle District of Florida.

## OPINION BELOW

The opinion of the Court of Appeals, dated March 25, 1983, is reported at 700 F.2d 1377-79 and is printed as Appendix A, infra, pp. 1a-11a.

## JURISDICTION

A timely petition for rehearing, was denied April 28, 1983 (App. B., infra, pp. 12a-13a).* The time to file this

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* References to "App. ___, p. ___a" are to the Appendix filed with this petition with appropriate page citations. References to "R. ___ at ___" and "S.R. ____ at ____" are to the document and page number contained respectively in the Record and the Supplemental Record on Appeal below.

petition was enlarged to and including July 27, 1983 by order of Mr. Justice Powell (App. C. infra, p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

## STATUTES AND RULES INVOLVED

Rules 11 and 32, Federal Rules of Criminal Procedure are set forth in Appendices E and F, infra, pp. 18a-31a.

## QUESTIONS PRESENTED

1. Whether petitioner, who fully performed his part of a written plea bargain, pleaded guilty, made restitution to the extent of his personal assets ($1.7 million), and waived his self-incrimination privilege, may obtain specific performance of the government's

agreement to "make no recommendation as to the sentence," or whether petitioner's sole remedy for the government's breach of the agreement is to replead?

2. Whether petitioner was accorded due process by a sentencing court which said it had decided upon sentence prior to reading anything from or hearing petitioner or his counsel?

## STATEMENT OF THE CASE

On December 3, 1981, petitioner entered into a written Plea Agreement (App. G, infra, pp. 32a to 37a), waived indictment and pleaded guilty to a one count information charging a violation of 18 U.S.C. § 2314. On January 24, 1982, -- after the government had breached the plea agreement by recommending a harsh sentence, and after the sentencing court denied petitioner's application for specific enforcement of the Plea Agree-

ment -- petitioner was sentenced to the maximum penalty allowed by law: ten years in prison and a fine of $10,000.00.

1. The Negotiation of the Plea Agreement

Petitioner's plea of guilty was the result of events which began eight months earlier. On April 2, 1981, petitioner, a stock broker, caused his counsel to meet with officials of the Securities and Exchange Commission ("S.E.C.") and the Department of Justice for the purpose of voluntarily bringing petitioner's unlawful conduct to the attention of the government. S.R. 3 at 2. In addition to making these disclosures, petitioner turned over to the government more than $20 million of investor's funds then controlled by him. Id.; App. I, p. 47a.

Thereafter, the S.E.C. and the Department of Justice, working in tandem,

proceeded simultaneously on two fronts: a criminal investigation run by the Department of Justice and a parallel civil investigation run by the S.E.C. S.R. 3 at 2. Discussions looking to a possible plea bargain culminated on December 3, 1981, in a written Plea Agreement which bound petitioner (1) to plead guilty to an information charging one count under 18 U.S.C. §2314, and (2) to "pay over to the appropriate person substantially all of his assets, in whatever form held, by way of restitution, and having a current value of approximately $1,714,561.00." App. G, p. 32a-33a. For its part, the Government agreed (1) that the bargained-for plea would be "in satisfaction of all charges that could be brought arising out of or relating to" petitioner's operation of certain investor programs during the

years 1977 through 1981 -- the subject of both the criminal and civil investigations -- and (2) that it "would make no recommendation as to the sentence, if any, to be imposed upon Defendant." Id.

2. The Petitioner's Plea of Guilty and His Subsequent Reliance

On that same date, petitioner, having waived indictment, entered the bargained-for plea.* The matter was set down for sentencing at a later date. App. H, pp. 42a-43a.

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* The District Court then stated: "The plea of guilty is accepted, and you are hereby adjudged to be guilty of the offense charged in this information." App. H, p. 42a. The court had previously noted that it reserved the power to "accept or reject the Plea Agreement" and that it "does not promise any sentence at this time." Id. at 41a-42a. The Plea Agreement however, was a Rule 11(e)(1)(B) type agreement which contained no provision regarding the sentence other than the government's promise to "make no recommendation." App. G, p. 33a; App. E, p. 21a.

Having entered the bargained-for plea, petitioner then fulfilled his obligation to make restitution by transferring his $1.7 million in assets to a Receiver appointed in the S.E.C. civil proceeding (R. 19 at 4), and -- although not a condition of the Plea Agreement -- proceeded to commence the process of cooperation with both the Receiver and with the S.E.C. R. 17 at 2. Foregoing the invocation of his self-incrimination privilege, petitioner testified and cooperated extensively at the request of the Receiver. App. I, p. 47a-48a.

3. The Government's Breach

Nonetheless, in January 1982, the S.E.C. stated that it did not consider itself bound by the Plea Agreement. S.R. 2 at 3. It followed up on that assertion with activities frankly intended to influence the sentencing court adversely

to petitioner on the question of sentence both through communications with the probation officer, and directly with the sentencing court itself. R. 17, Exhibits B, D and E. Its final communication -- a letter addressed directly to the sentencing court -- was a call for a harsh punishment:

> We believe that Mr. Greenman's repeated and egregious conduct should be dealt with in a manner, not only to punish Mr. Greenman, but to have the appropriate deterrent effect on others who might consider 'white collar' crime as inconsequential and unlikely to warrant imposition of a meaningful sentence. R. 17, Exhibit E, at 3.

4. The Trial Court's "Rejection" of the Plea Agreement and Offer to Allow Defendant to Replead As His Sole Remedy

When he learned of these letters, counsel for petitioner objected that they violated the written Plea Agreement and requested that the Court ignore them.

S.R. 2. Rather than address the question of a breach of the Plea Agreement, however, the sentencing court simply purported to reject the Plea Agreement itself and offered petitioner an opportunity to withdraw his plea. (App. I, pp. 44a-45a). The Court first stated that its decision to do so was influenced by the letters from the S.E.C., but then withdrew this acknowledgment. (App. I, p 46a-47a.)

In an attempt to preserve the benefits of the Plea Agreement, petitioner moved to reassign the matter to another judge for sentencing (R. 17). The Government argued in opposition (R. 18) that the S.E.C. was free to act as it wanted because, first in promising to make no recommendation on sentence, the Government attorney intended to bind only himself and did not intend to bind the

S.E.C. (though he had never disclosed this "intent" to petitioner), second that even if the S.E.C. was bound by the Agreement, its call for a harsh sentence was not a recommendation on sentence, but "merely . . . its thoughts . . . on the Greenman matter and its ramifications," (R. 18 at 2), and third that, in any event, petitioner's only remedy was to withdraw his plea, that he could not "claim a breach on the one hand and attempt to enforce it on the other." R. 18 at 2.

The sentencing court adopted each of these positions, denied the motion, and after petitioner refused to withdraw his plea, seeking instead the benefit of his bargain, proceeded to sentencing.* App. J, pp. 56a-57a.

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* Inquiring as to whether any factually erroneous information had been submitted, the Court was told that there had been, but proceeded anyway without making further inquiry. R. 22 at 12-14.

Prior to hearing petitioner and his counsel -- which the Court very nearly refused to do (Id. pp. 51a-53a and 58a) -- the Court made it clear that it had already decided what the sentence would be. The Court said it had "already made a decision as to what the sentence should be" "early on in this case," before looking at the S.E.C.'s letters, that is, before even learning petitioner's version, or receiving any reactions to the pre-sentence report or any statement in mitigation. Id. at 59a-60a. The Court allowed petitioner and his counsel to make their plea in mitigation, then immediately imposed the maximum sentence -- ten years and a $10,000 fine -- and remanded petitioner (who had been released on his own recognizance) because he felt there were no appeal-worthy issues. Id. at 60a-62a.

5. The Eleventh Circuit Affirmance

The Eleventh Circuit assumed for the purpose of its decision that there was a breach of the agreement (App. A, p. 6a), but held, citing the rationale of Santobello v. New York, 404 U.S. 257 (1971), that the "opportunity to replead is a proper remedy for any possible breach in this case." App. A, p. 8a. The court reasoned that any governmental breach was cleansed by offering petitioner a chance to replead, and that by insisting on specific performance, petitioner, in effect, "chose to plead guilty while fully aware of the alleged breach of his plea bargain." Id. The court then concluded, "We can find no support for the proposition that a broken plea agreement must be specifically enforced when the guilty plea was entered with knowledge of the alleged breach." Id.

The court acknowledged that if "appellant's earlier reliance on the plea agreement prejudiced his position or [gave] the prosecution an unfair advantage" they "possibly" would order specific enforcement. Id. n. 1. The court did not discuss and apparently rejected as "prejudice" or "unfair advantage," petitioner's restitutionary payment of $1.7 million, his waiver of his Fifth Amendment rights, and his entry of a plea of guilty.

On the issue of the sentencing court's impartiality, the Eleventh Circuit viewed the sentencing court's statement that it "had already made a decision as to what the sentence should be" as "merely a response to appellant's assertion of improper influence by the S.E.C. letters, and not an admission that the judge was unalterably predisposed to the

sentence appellant received." Id. The court concluded that the judge "did not refuse or fail to consider any evidence or argument favorable to appellant" because he "reviewed all relevant reports and gave appellant an opportunity to speak" and therefore "nothing in the record of this case compels us to conclude that the district judge closed his mind to evidence favorable to appellant before the sentencing proceedings were concluded." Id.

A timely petition for rehearing urging that the Court of Appeals overlooked evidence of "prejudice" to petitioner and "unfair advantage" to the Government resulting from reliance on the Plea Agreement. That motion was denied without opinion on April 28, 1983.

REASONS FOR GRANTING THE WRIT

This petition presents important constitutional issues which have been unsettled since this Court's 1971 opinion in Santobello v. New York, 404 U.S. 257 (1971), concerning the constitutionally required remedy for breach by the government of a written plea bargain agreement.

There, this Court reviewed a state court conviction on a plea of guilty where petitioner sought leave to withdraw his plea because of the prosecutor's breach of his promise to make "no recommendation" as to the sentence. Reversing the conviction, this Court established as a rule of constitutional law that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled" both in "the interests of justice and [in] appropriate recognition of the

duties of the prosecution in relation to promises made in the negotiation of pleas of guilty. . . ." Id. at 262. But how that promise is to be "fulfilled", whether by withdrawal of the plea or by specific performance of the bargain, and whether, under certain facts, there can be a constitutional right to specific performance, are questions left undecided by the Court.

The Chief Justice, writing for a majority of himself and Justices Douglas, White and Blackmun left the decision on "[t]he ultimate relief to which petitioner is entitled . . . to the discretion of the state court. . . ." Id. at 263. Justice Douglas, concurring, concluded that "[i]n choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight. . . ." Id. at 267.

Justices Marshall, Brennan and Stewart dissented in part, on the ground that when the prosecutor's promise is unfulfilled, the plea fails, and therefore it was unnecessary to put the remedy issue to the state court. The dissent went on to note that "where the prosecutor has broken the agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here." Id. at 268.

That is the remedy sought in this case. The question left open by Santobello -- when that remedy is appropriate, or, indeed, constitutionally required -- is squarely presented. Although the remedy issue has been heavily litigated in the 13 years since Santobello, with opinions in every circuit, "various approaches have been taken among the circuits as to the granting of relief for

breach of a plea agreement," Pierre v. Thompson, 666 F.2d 424, 427 (9th Cir. 1982); see generally Westen and Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Cal. L. Rev. 471 (1978). And the various approaches are in conflict.

Three main lines of authority have developed, with apparent variations within each line. One line of cases proceeds from the formation of reasonable expectations on the part of the defendant in reliance upon the honor of the government in making and keeping its promises. These cases do not require any showing of prejudice on the part of the defendant, recognizing instead "a constitutional right to enforcement of plea proposals . . . on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and

abiding by its proposals", Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979); see also United States v. Society Of Independent Gasoline Marketers, 624 F.2d 461, 472 (4th Cir. 1980) (on rehearing), cert. denied, 449 U.S. 1078 (1981); United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979); Westen and Westin, supra, at 517-19 (collecting similar state cases); cf. United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1981), cert. denied, 451 U.S. 1018 (1981).

In Cooper, the leading case in this line, an Assistant United States Attorney had offered defendant's counsel a plea bargain which defendant's counsel stated he would present to his client. The defendant immediately accepted the proposal, but before his counsel could communicate the acceptance to the govern-

ment, the proposal was withdrawn. The Constitutional right to "fairness" was violated, the court held, when a reasonable offered plea bargain was quickly withdrawn simply because of "a superior's second-guessing of a subordinate's judgment." 594 F.2d at 19. The court specifically rejected the notion that the right was dependent upon antecedent performance by or prejudice to a defendant. Id. at 17 n.6.

A second line of authority holds that each case is decided on an ad hoc basis with the choice of appropriate remedy for governmental breach of a plea agreement left largely in the discretion of the sentencing court. E.g. United States v. Corsentino, 685 F.2d 48, 52 (2d Cir. 1982) (government breach of agreement to take no position at sentencing; defendant entitled to specific enforcement where that was relief sought);

United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978) (where defendant has not requested withdrawal and specific performance practical, it is the appropriate remedy); United States v. Cook, 668 F.2d 317, 321 (7th Cir. 1982) (withdrawal appropriate where requested and specific performance "neither practical nor desirable"); United States v. Garcia, 698 F.2d 31, 37 (1st Cir. 1983); Pierre v. Thompson, 666 F.2d 424, 427 (9th Cir. 1982); United States v. Mack, 655 F.2d 843, 848 (1981); United States v. Runck, 601 F.2d 968, 970 (8th Cir. 1979) (on petition for hearing), cert. denied, 444 U.S. 1015 (1980).

A third line of cases denies a defendant the right to enforce a broken plea bargain -- permitting him only to replead -- unless he can establish prejudice suffered through reliance on the

plea bargain agreement. In Government of the Virgin Islands v. Scotland, 614 F.2d 360 (3d. Cir. 1980) the Third Circuit expressly declined to follow Cooper and held the "fundamental right [to a jury trial] would be belittled if we held it to be an insufficient 'remedy' or result for a defendant who has not been induced to rely on the plea to his detriment".*

The Fifth Circuit, in United States v. Ocanas, 628 F.2d 353 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981) followed the same rule. There the government breached a plea agreement after defendant had pleaded guilty, but before acceptance of the plea and sentencing by

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* The Scotland court suggested, however, that once the plea had been entered or some obligation of the plea agreement performed, then the agreement could be enforced. Id. at 365 and n. 14.

the court. The Fifth Circuit held:

> As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.
>
> We realize that appellants relied on the government's promise by tendering guilty pleas and submitting to extensive presentence investigations. A showing that the government gained some unfair advantage over them as a result of their reliance might have justified a departure from the general rule. But they offered no eviden e that information provided by them in the course of plea bargaining and presentence investigation was used by the government either in obtaining the second indictment or at trial.

Id. at 358. See also, United States v. Yates, 698 F.2d 828, 829-30 (6th Cir. 1983), but see Cohen v. United States, 593 F.2d 766, 771-72 (6th Cir. 1979).

Though the decision of the Eleventh Circuit here purports to follow the Ocanas line of authority, it actually

stakes out a new position. In denying petitioner enforcement of the broken agreement because he had not been sufficiently "prejudiced" by his earlier reliance on the plea agreement, the court gives no value, nor even mention, to petitioner's Fifth Amendment waiver or to his restitutionary payment. By implication, acts of this kind will not qualify as prejudice in the Eleventh Circuit. It is difficult to imagine what acts might be viewed by the Eleventh Circuit as constituting prejudice, and the decision below may mean that defendants there may never specifically enforce broken plea agreements.*

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* Compare United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) (en banc), cert. denied 417 U.S. 933 (1974) (cooperation with U.S. Attorney is prejudice giving right to specific performance); see also Roe

[Footnote continued]

This reading of the Court of Appeals opinion gains further force from the fact that the court below denied enforcement because it viewed petitioner as having "entered" his plea after the governmental breach. App. A, pp. 6a-8a. What the court meant is that petitioner stood fast in seeking enforcement, and refused the offered alternative of withdrawal. By refusing to withdraw his plea, he was then deemed to have repleaded after learning of the government's breach. Put another way, by refusing to withdraw from the agreement, he lost the right to enforce it. By this reasoning, of course,

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[Footnote continued]

v. United States Attorney, 618 F.2d 980, 982 (2d Cir. 1980) (same); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 295-97 (2d Cir. 1976) (restitution of stolen jewels sufficient consideration to require specific performance).

no defendant will ever be entitled to require the government to perform its agreements because a defendant who seeks enforcement would always be deemed to have waived his right by refusing to withdraw his plea. This rule, effectively denying any right to specific enforcement, appears to be unique to the Eleventh Circuit. Compare United States v. Mack, 655 F.2d, 843 (8th Cir. 1981) (second plea entered).

The above recitation of the case law makes several facts clear. First, the majority of these rulings are fundamentally inconsistent with the opinion of the Eleventh Circuit in this case. If defendant had a constitutional right to insist on specific performance of the Plea Agreement, then he could not have waived that right by insisting on it and refusing the trial court's alternative

offer of withdrawal. Alternatively, if the sentencing court had discretion to order specific performance, then the case must be remanded since the court expressly disavowed that discretion.

Second, the cases discussed in this petition, which are merely the most recent and/or important of the plethora of like cases since Santobello, also demonstrate the importance of the remedy issue to many litigants and the many instances in which this difficult problem arises.

Further, it is also obviously true that to the extent that the plea bargain system functions well, it does so because of the confidence of the defendants and the defense bar generally in the ability to hold the government to its plea bar-

gain promises.* Once that confidence is eroded, as it would be through application of the Eleventh Circuit's rule, the entire plea bargaining system would be jeopardized. As the Fourth Circuit stated in Cooper v. United States, 594 F.2d 12 (4th Cir. 1979): "'There is more at stake than just the liberty of this

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* Indeed, the ABA Standard for the Prosecution Function expressly provides:

> Standard 3-4.2. Fulfillment of plea discussions
>
> * * *
>
> (c) It is unprofessional conduct for a prosecutor to fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

American Bar Association Standards, The Prosecution Function. Accepted Draft, 1979, at 3.66.

defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice....'" Id. at 20, quoting United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974).

That observation is particularly to the point when the government makes promises regarding recommendations as to sentencing. Such recommendations are not required to be followed, but it certainly appears to defendants who bargain for such an agreement that the recommendation may well influence the sentencing court. If the government can breach that provision and leave defendant with only a remedy of repleading before the same district judge, then the remedy is no remedy at all and the agreement can be breached with impunity.

Accordingly, to remove the present confusion existing among the various Circuit courts and to make uniform a rule that fully recognizes a pleading defendant's due process rights and supports the proper functioning of the plea bargaining system, we request that certiorari be granted and that the Eleventh Circuit's decision be reversed.

2. It is well established law, and a requirement of Federal Rule of Criminal Procedure 32(a), that the defendant and his counsel be allowed an opportunity to make a statement in mitigation of punishment. Green v. United States, 365 U.S. 301 (1961). Nor is this an empty formalism. The Court has a duty not only to listen to the allocution, but to give all such information serious consideration. United States v. Sparrow, 673 F.2d 862, 869 (5th Cir. 1982); United States v.

Long, 656 F.2d 1162, 1165 (5th Cir. 1981); United States v. Malcolm, 432 F.2d 809, 817 (2nd Cir. 1970).

Here the sentencing judge admitted that long before any sentencing hearing he "had already made a decision as to what the sentence should be." The Court expressly stated just moments before the Rule 32 hearing:

> THE COURT: Well, I told you early on in this case that I have read these letters [from the S.E.C.] and received them, but that I had made a decision to reject the plea agreement before even looking at them and had already made a decision as to what the sentence should be in this case if this were to happen; that the defendant decides not to withdraw the plea of guilty.* (App. J, pp. 59a-60a)

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* The Court had previously stated on January 14 that before receiving the S.E.C. letter it "had made the decision to reject" the plea App. I, pp. 46a-47a. It was apparently referring to that statement in the above quotation.

In the face of this clear admission, the Eleventh Circuit held that "nothing in the record of this case compels us to conclude that the district judge closed his mind to evidence favorable to appellant before the sentencing proceedings were concluded" (App. A, p. 11a). To explain the district judge's statement to the contrary, the Court of Appeals called that it "merely a response to appellant's assertion of improper influence" (App. A, p. 10a).

Leaving aside the fact that the court below devalued this admission as merely an effort to respond to a different legal challenge, the fact remains that this approach is the precise reverse of the one in Santobello. There, the trial court claimed that the prosecutor's improper comments on sentencing had no influence on the sentence. This court

said it had "no reason to doubt that", but that "the interest of justice and appropriate recognition of the duties of the prosecutor . . . will best be served by remanding." 404 U.S. at 262.

Given the District Court's statement, the interests of justice, the appearance of impartiality and "recognition of the duties" of the sentencing court all require reversal. As several circuit courts have aptly held:

> It is well recognized that '[i]t is difficult for a judge, having once made up his mind, to resentence a defendant. . .,'. Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972). See United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973), cert. denied, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed. 2d 672 (1974).

United States v. Navarro Flores, 628 F.2d 1178, 1184 (9th Cir. 1980).

The Eleventh Circuit's disregard of this important principal also merits Supreme Court review.

## CONCLUSION

As the foregoing discussion demonstrates, petitioner has been deprived of any semblance of the Constitutional right recognized in Santobello: he was lured into a written by the proffer of reciprocal promises, relied on it by entering a plea of guilty, making restitution and waiving his Fifth Amendment rights, and was denied the benefit of the bargain because the government simply broke its promise.

The Circuits are sharply divided over the proper remedy in such a case, although the Eleventh Circuit's approach seems to stand alone. We respectfully urge that it is time for the Supreme Court to resolve that conflict and to enforce the holding of Santobello that the "promise or agreement of the prosecutor . . . must be fulfilled." 404 U.S. at 262. For that reason, and for the

other reasons set forth in this petition, we respectfully submit that the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 26, 1983

Respectfully submitted,

Peter H. Morrison
Max Folkenflik

110 East 59th Street
New York, New York 10022
Counsel for Petitioner.

APPENDIX A



UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS E. GREENMAN,
Defendant-Appellant.

No. 82-5119.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1983

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge, and MORGAN, Senior Circuit Judge.

LEWIS R. MORGAN, Senior Circuit Judge:

Appellant seeks to vacate his prison sentence by alleging a broken plea agreement and failure of the district judge to act impartially during sentencing. The relevant facts are not in dispute. Between 1977 and 1981, appellant operated a fraudulent investment scheme which gathered millions of dollars in investor funds. In April of 1981, he voluntarily reported his illegal activity to the Department of Justice (DOJ) and the Securities Exchange Commission (SEC), and both agencies began investigations. After several months of investigation and plea negotiations, the DOJ and appellant formulated a plea agreement. This agreement provided that appellant would plead guilty to one count of fraud in violation of 18 U.S.C. §2314 and liquidate all of his personal assets as restitution. In

exchange, the DOJ promised not to file additional charges and promised not to make a sentencing recommendation to the district judge. After the plea agreement was concluded and submitted to the district court, SEC officials independently wrote the district judge and recommended that appellant be given a sufficiently harsh sentence for deterrent purposes, although a specific sentence was not suggested. Appellant then cited the SEC recommendation as a breach of the plea agreement and requested that the district judge ignore the SEC letters and instruct the SEC to obey the conditions of the plea agreement. He argued that the DOJ's promise to make no sentencing recommendation bound the entire United States government, including the SEC. Instead of addressing appellant's argument, the

district judge concluded that the plea bargain was too lenient since it precluded the government from filing additional charges for a particularly egregious fraud, and rejected the entire plea agreement, not wishing to give "some sort of judicial stamp of approval." The district judge acknowledged that the decision to bring only a one count indictment was solely within the discretion of the prosecution, but refused to endorse such a decision in this case. Appellant was then given one week to consider withdrawing his guilty plea. Appellant chose not to change his plea, and was given the maximum sentence of ten years in prison and a $10,000 fine. In this appeal, appellant argues that the district court was without power to reject the plea agreement, and thus the SEC

letters were a breach of that agreement. He also contends that the district judge failed to remain impartial with regard to sentencing since the judge admitted that he had decided what the appropriate sentence should be even before reading the SEC letters and other information contained in the probation officer's report. Appellant urges us to vacate his sentence for these reasons and remand the case to another district judge for sentencing in compliance with the original plea agreement. For the following reasons, we affirm.

[1] Appellant's first claim on appeal is that a district court lacks the power to reject a plea bargain which requires no affirmative action on the part of the district judge. In other

words, if the plea agreement does not require the district judge to take a particular action in conformity with the plea agreement, then the agreement cannot be rejected. Therefore, appellant argues, the plea agreement in this case was improperly rejected and the otherwise valid agreement was later breached when the SEC recommended a harsh sentence. We need not decide whether these arguments are correct, however, since we find that appellant would not be entitled to any relief even if we accepted his position. Appellant cites numerous decisions which have ordered specific performance of a broken plea agreement, but all of these cases involved defendants who pled guilty without knowing that their plea bargain had been or would be breached by the prosecution. See, e.g., United States v.

Block, 660 F.2d 1086 (5th Cir. 1981); United States v. Shanahan, 574 F.2d 1228 (5th Cir. 1978); United States v. Grandinetti, 564 F.2d 723 (5th Cir. 1977). See also Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In those cases, the defendants pled guilty and thereby forfeited certain rights in anticipation of the prosecution's full performance of the terms of their plea agreements. In the present case, however, appellant chose to plead guilty while fully aware of the alleged breach of his plea bargain. The district court gave him one week to consider withdrawing his plea after he objected to the SEC letters. Therefore, appellant cannot argue now that his guilty plea was conditioned on any unfulfilled promise of the prosecution. He

entered his plea voluntarily and fully aware of all relevant circumstances and the possible consequences. We can find no support for the proposition that a broken plea agreement must be specifically enforced when the guilty plea was entered with knowledge of the alleged breach. Under the rationale of Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the opportunity to replead is a proper remedy for any possible breach in this case.[1]

---

1. Of course, had appellant's earlier reliance on the plea agreement prejudiced his position or given the prosecution an unfair advantage, then we possibly would order the plea agreement enforced. See United States v. Aguilera, 654 F.2d 352 (5th Cir. 1981); United States v. Ocanas, 628 F.2d 353 (5th Cir. 1980).

[2] Appellant also contends that the district judge failed to remain impartial during the sentencing proceedings. This argument is based on the following remark made by the district judge in response to appellant's objections to the SEC letters: "[I] had already made a decision as to what the sentence should be in this case . . . ." Appellant believes that this comment evidences an impermissible bias violative of due process. In support of his argument, appellant relies on several decisions of the Supreme Court and this circuit which have held that a sentence should be vacated if the sentencing judge was unalterably predisposed toward a particular punishment. Green v. United States, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961); United States v.

Long, 656 F.2d 1162 (5th Cir. 1981); United States v. Becker, 437 F.2d 1086 (5th Cir. 1971). While this is true, appellant's argument fails to recognize that these cases all involved situations where the sentencing judge refused or neglected to hear the defendant's plea of leniency or to review presentence reports compiled pursuant to Rule 32 of the Federal Rules of Criminal Procedure. This appeal does not present a similar situation. When read as a whole, the record indicates that the disputed remark was merely a response to appellant's assertion of improper influence by the SEC letters, and not an admission that the judge was unalterably predisposed to the sentence appellant received. The judge below did not refuse or fail to consider any evidence or argument favor-

able to appellant. He reviewed all relevant reports and gave appellant an opportunity to speak before imposition of the sentence. In short, nothing in the record of this case compels us to conclude that the district judge closed his mind to evidence favorable to appellant before the sentencing proceedings were concluded.

For these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B



IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 82-5119

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Dennis E. Greeman,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

( )

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. ENTERED FOR THE COURT:

/s/ John C. Godbold

United States Circuit Judge

U.S. Court of Appeals
Eleventh Circuit
Filed
Apr. 28, 1983
Norman E. Zoller
Clerk

APPENDIX C



SUPREME COURT OF THE UNITED STATES

No. A1032

Dennis E. Greenman,
Petitioner,

v.

United States

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 27, 1983.

/s/ Lewis F. Powell
Associate Justice of the
Supreme Court of the
United States

Dated this 23rd day of
June, 1983

APPENDIX D



JUDGMENT AND PROBATION/COMMITMENT ORDER

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CASE NO. 81-137-Cr-<br>-GC |
| DENNIS GREENMAN, Defendant. | ) | |

In the presence of the attorney for the government the defendant appeared in person on this date, January 28, 1982.

WITH COUNSEL: Peter Morrison, Esq. and Lawrence R. Metsch, Esq.

Plea: GUILTY, and the court being satisfied that there is a factual basis for the plea,

There being a finding of GUILTY.

Defendant has been convicted as charged of the offense(s) of Interstate Transportation of Fraudulent Securities;

all in violation of Title 18, United States Code Section 2314.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years, or until the defendant is otherwise discharged as provided by law.

It is also ADJUDGED that defendant pay a fine of Ten Thousand ($10,000.00)

Dollars.

Signed By
U.S. District Judge /s/ George C. Carr
George C. Carr

Date January 28, 1982

Filed Clerk, U.S. District Court
5:00 P.M., January 28, 1982
Middle District of Florida
Tampa, Florida

APPENDIX E



RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and

inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the

opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant that that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall

be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

## APPENDIX F



## RULE 32, FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and

file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information

sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the

extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition

of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

APPENDIX G



IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

CASE NO. 81-137-Cr.T.GC

UNITED STATES OF AMERICA, )

Plaintiff, )

v. ) PLEA AGREEMENT

DENNIS E. GREENMAN, )

Defendant. )

_____)

Defendant DENNIS E. GREENMAN and the UNITED STATES DEPARTMENT OF JUSTICE (DOJ) mutually agree as follows:

Defendant shall enter a plea of guilty to the Information in satisfaction of all charges that could have been brought arising out of or relating to Defendant's operation of the so-called

"Special Arbitrage Program" and the "Short-Term Trading Program" during the years 1977 and 1981. Defendant and the DOJ further agree that the DOJ shall make no recommendation as to the sentence, if any, to be imposed upon Defendant. Finally, Defendant and the DOJ agree that Defendant shall pay over to the appropriate person substantially all of his assets, in whatever form held, by way of restitution, and having a current value of approximately $1,714,561.00.

It is understood that the Court may impose a less severe sentence than that (if any) embodied in this agreement. But in the event the Court otherwise rejects this agreement, Defendant shall then be given an opportunity to withdraw his plea of guilty.

Defendant acknowledges that he is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the Government and Defendant or his attorneys and without promise of benefit of any kind (other than concessions contained herein); and without threats, force, intimidation or coercion of any kind. Defendant further acknowledges his understanding of the nature of the offense to which he is pleading guilty, and the elements thereof, including the penalties provided by law. Defendant acknowledges his complete satisfaction with the representation and advice received from his undersigned counsel. Defendant also understands that

he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against him, the right not to be compelled to incriminate himself, and the right to compulsory process for the attendance of witnesses to testify in his defense. By pleading guilty, Defendant acknowledges, he waives or gives up those rights and there will be no trial. Defendant further understands that if he pleads guilty, the Court may ask him questions about the offense to which he has pleaded guilty, and if he answers those questions under oath, on the record and in the presence

of counsel, his answers may later be used against him in a prosecution for perjury or false statement. Defendant also understands that he will be adjudicated guilty of the offense to which he has pleaded guilty and may thereby be deprived of certain civil rights such as the right to vote, to hold public office, to serve on a jury, and to have possession of firearms.

This agreement shall be presented to the Court, in open court, and filed with this cause, at the time of arraignment for the purpose of Defendant's entry of a plea of guilty pursuant hereto.

The undersigned counsel hereby certify that this agreement has been read

by Defendant, and that Defendant fully understands its terms.

Dated this 3rd day of December, 1981.

GARY L. BETZ
United States Attorney

By:/s/ Judy S. Rice
Judy S. Rice,
Assistant United States Attorney

/s/ W. Christian Hoyer
W. CHRISTIAN HOYER
Special Attorney
U.S. Department of Justice

/s/ Dennis E. Greenman
DENNIS E. GREENMAN (Defendant)

/s/ Lawrence R. Metsch
LAWRENCE R. METSCH
Attorney for Defendant
Penthouse
Peninsula Federal Building
200 Southeast First Street
Miami, Florida 33131
(305) 358-9300

APPENDIX H



Excerpts from Transcript of December 3, 1981 with Plea of Guilty

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, vs. DENNIS GREENMAN, Defendant. | ) | CASE NO.: 81-137-CR-T-GC |

* * *

MR. JAMES: Your Honor, I also filed with the Court a copy of a written Plea Agreement, which sets out the agreement between the parties.

THE COURT: All right. It is, as I understand, Mr. Metsch, the desire now for -- although he has entered -- of course, to be a guilty plea, he needs to

be advised by this Court, under Rule 11 of the Federal Rules of Criminal Procedure, of his various rights that he might give up by pleading guilty along with other matters.

Mr. Greenman, it's my understanding, then, that now you desire to enter a plea of guilty to the charges set forth in the information filed in this case?

MR. GREENMAN: Yes, Your Honor.

THE COURT: It is your right to plead guilty to this charge, but before the Court may accept a plea of guilty, it's necessary that the Court find that your plea is made freely and voluntarily and that there is a factual basis for the plea. It will be necessary that certain

questions be asked you about the offense to which you plead.

The Court will place you under oath, and if you don't tell the truth these answers may later be used against you in a prosecution for perjury or a false statement or in any proceeding challenging the entry of this plea.

If you don't understand any of the questions that I ask, or any of the words that I use during this proceedings, feel free to ask that they [be] explained; and at any time you may consult with either of your attorneys, who are here with you, upon any matter that may come up during this proceeding.

Please, swear the defendant, Ms. Ropes. . . .

* * *

Q. I also note that you have agreed with the Government that the Court may impose a less severe sentence than that embodied in the agreement, which is the maximum penalty under this information; but in the event the Court rejects this agreement, then you will be given an opportunity to withdraw your plea of guilty. Do you understand that?

A. Yes, I understand.

Q. We will have a presentence investigation made, and the Court will receive a presentence report and then at a Sentencing Hearing the Court will decide whether to accept or reject the Plea Agreement.

You should understand that the Court does not promise you any sentence

at this time, but simply these alternatives and that whatever disposition that is made, is a matter within the sole discretion of the Court.

Now, how do you plea to the information which I have just read to you?

A. Guilty, Your Honor.

* * *

THE COURT: The Court finds, then, that you, Dennis Greenman, are now alert and intelligent, that you understand the nature of the charge against you and the possible penalties, and appreciate the consequences of pleading guilty....

The plea of guilty is accepted, and you are hereby adjudged to be guilty of the offense charged in this information.

The probation office is hereby directed to conduct a presentence investigation and file a presentence report at its earliest convenience. We need now to set a time for sentencing. . . .

APPENDIX I



Excerpts from Transcript of January 14, 1982 with Order Rejecting Plea Agreement

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CASE NO.: 81-137-CR-T-GC |
| DENNIS GREENMAN, Defendant. | ) | |

THE COURT: Mr. Morrison.

The Court has reviewed the presentence report in this case and now decides to reject the plea agreement.

Mr. James, and I don't need to make too many remarks about it, the Court is cognizant of the fact that the Department of Justice, as part of the Executive Branch, can charge, and has wide discre-

tion to charge as they see fit, and may feel that this is an adequate plea agreement, but this Court is not going to put its judicial imprimatur on this plea agreement, so we are going to have to go from there.

In accordance with what the Court told you at the rearraignment proceeding, Mr. Greenman, and I think as provided by this agreement, you will now be offered an opportunity to withdraw your plea of guilty to the information filed in this case.

* * *

MR. MORRISON: May I ask respectfully, Your Honor, and I'm sure Your Honor will understand that I must ask whether Your Honor has seen any letters

from the SEC that were sent in this matter?

THE COURT: I asked the probation officer to give you everything that I saw or attach it to the presentence report. I assume that he did. And I saw letters from the SEC.

MR. MORRISON: May I ask respectfully whether it weighed on Your Honor in making this decision?

THE COURT: Well, I don't -- it may -- in all honesty it may have in some way, but that was not the prevailing matter, just the official version of the offense was all I needed. I -- I might say this, in all honesty, that I had made

the decision to reject the plea agreement before I saw anything from the SEC.

MR. MORRISON, My difficulty, if Your Honor please, and I'm sure Your Honor would be aware of this, is that we have crossed the Rubicon in the sense that while there are certain protections that we have pursuant to Rule 11 --

THE COURT: That's correct.

MR. MORRISON: -- they do not extend far enough, because subsequent to the entry of the plea of guilty in this matter our client has worked quite extensively with the receiver in Miami to facilitate the return of some substantial portion of the $20 million on hand to investors.

He has worked at this point for probably a hundred hours with the receiver. He has given two full days of deposition at which he was --

THE COURT: Well, if he was sincere in the letter that he wrote to the Court, he would want to do that in any event.

MR. MORRISON: Well, there's no question that he wants to do that in any event.

THE COURT: Then he hasn't been prejudiced that I can see.

* * *

APPENDIX J



Excerpts from Transcript of January 28, 1982 with Orders Denying Reassignment for Sentencing and Evidentiary Hearing, and the Sentencing of Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CASE NO.: 81-137-Cr-T-GC |
| | ) | |
| DENNIS GREENMAN, | ) | |
| | ) | |
| Defendant. | ) | |

THE COURT: Good morning. This is Case Number 81-137-Cr-T-GC, the case of United States of America versus Dennis E. Greenman. Mr. Morrison, I have had an opportunity now to read and consider the cases that you cited in support of your Motion to Reassign the case as well as considering the motion.

I am persuaded that all of those cases -- and really what you're saying is that there has been a breach of this plea agreement or breach of a bargain or a contractual violation by this United States Attorney. That's what all these cases were about. I don't think this is the same thing at all.

I'm persuaded, by the inescapable logic of Mr. Hoyer, that this plea agreement, as far as I'm concerned, has not been breached. It's clearly the intent of the U.S. Attorney only to bind the Department of Justice, and I don't think that carries forward to the Securities and Exchange Commission. And even if it did, they have not recommended any sentence. So the Court is denying your Motion to Reassign the case.

Now, you need to decide -- or Mr. Greenman needs to decide whether he wants to withdraw his plea of guilty and enter a not guilty plea or not.

MR. MORRISON: We are prepared to make that decision, if Your Honor please. But before we proceed to that point, I would just like to say that with respect to the question of Mr. Hoyer's intent, as I said on the record last week, just so that it is clear to Your Honor, if that was indeed his intent, it was never communicated, it is not the law, and if Your Honor does put --

THE COURT: I'm not hearing any further argument.

MR. MORRISON: But I would like to at least make my record, if I might.

THE COURT: All right.

MR. MORRISON: What I'm asking Your Honor for, is Your Honor has made a ruling on this motion based, at least, in part on what you take to be the intent of Mr. Hoyer that has not even been submitted in sworn form. And I ask Your Honor to hold an evidentiary hearing on that issue.

THE COURT: That's not necessary. That's not the sole basis for it, it's very clear. You can't have it both ways as Mr. Hoyer has, I think, set forth. And it's very simple logic to me. You can't say they've breached the agreement and then you want to enforce it. If you feel it's been breached, your remedy is certainly to withdraw this plea, and I'm allowing you to do that.

MR. MORRISON: Respectfully, I disagree that that's my only choice. And I'm not really speaking to that point, if Your Honor please. I'm saying that to the extent that Your Honor's ruling with respect to whether or not the agreement binds anybody other than the Department of Justice, I respectfully suggest that as a matter of law, it goes far beyond the Department of Justice and moreover --

THE COURT: Well, I've done some independent research on that and I'm convinced that's not the law.

MR. MORRISON: I respectfully disagree. And I am then asking Your Honor, I want to be as clear about it as I can, for an evidentiary hearing as to the meaning of the agreement and what the

agreement was that was reached between the parties.

THE COURT: That's denied.

MR. MORRISON: Then with respect to the question of whether or not what the SEC did by its letters and whether this constitutes a breach of the agreement, I want to say to Your Honor, and represent to Your Honor as an officer of the Court, and I'm willing to testify under oath, that the agreement that we negotiated with the Government, the agreement I negotiated with the Government, was an agreement that the Government would take no position on sentencing. It is true that the words of the agreement that were signed say that the Government will make no recommendation on

sentencing. And I tell Your Honor that they mean the same to me, they meant the same to me when we negotiated the agreement, they mean the same to me today and they mean the same to Judge Stern of the Third Circuit, as he said so eloquently in his dissent in the Miller case which is cited by Mr. Hoyer in his memorandum that he submitted to Your Honor. And I think that it may even have meant the same thing to the Government here, because we never heard a word about being any difference between those two phrases until the last couple of days. So here too on this issue, if Your Honor please, I ask for an evidentiary hearing.

THE COURT: All right. That's denied. Do you want to respond just for the record?

MR. HOYER: For the record, I would say the words chosen were chosen with care. It's in writing signed by the parties, and I would ask there be no more argument on a motion that's been denied.

THE COURT: All right. Now, you need to decide.

* * *

MR. MORRISON. Now, our position, if Your Honor please, is that we, in the circumstances, since we feel that the, respectfully, that the plea agreement remains viable. And since we believe that there has been a breach by the Government, we do not feel that we're forced to withdraw our plea and so reserving our position on these things, respectfully, if Your Honor please, we

wish to remain bound to what we think is still a viable agreement and not to withdraw the plea.

THE COURT: I'm telling you the Court does not consider it such and is not bound in any way by the plea agreement. Of course, the irony of the thing is that the Court could sentence this defendant to the same sentence under either the agreement or the absence of the agreement.

* * *

THE COURT: All right. You do not -- your client does not want to withdraw the plea?

MR. MORRISON: No, we adhere to the agreement, if Your Honor please, as I think we are entitled to do under Shanahan.

THE COURT: I'm telling you you're not. Either you're going to continue the plea of guilty or you're going to withdraw it. Is he continuing his previously entered plea of guilty?

MR. MORRISON: Yes, indeed he is, Your Honor.

THE COURT: All right. Come forward, Mr. Greenman, for sentencing.

MR. MORRISON: May I be heard on sentence, Your Honor?

THE COURT: Well, within reason. You filed -- certainly he's entitled to allocution, and -- within reason, certainly.

* * *

MR. MORRISON: Yes, but I was not addressing the respects in which they

[the S.E.C. letters] were inaccurate, because I thought that the main point to be considered was that the letter should not have been submitted in the first place and should be expunged from the proceeding.

Now, Your Honor has ruled that -- to the contrary. And I don't know whether Your Honor has taken into account any of the things said by the SEC in their letter.

THE COURT: Well, I told you early on in this case that I have read these letters and received them, but that I had made a decision to reject the plea agreement before even looking at them and had already made a decision as to what the sentence should be in this case if

this were to happen; that the defendant decides not to withdraw the plea of guilty.

Mr. Greenman, you now being before this Court attended by your attorney and having entered a plea of guilty to information filed in this case, the Court does now adjudge you to be guilty of said offense.

* * *

THE COURT: [following the defendant's statement in mitigation] Thank you. The Court being fully informed herein and no cause having been shown which would preclude pronouncement of sentence, it's now adjudged that the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for a term of ten years. And in addition to that, it is adjudged that the defendant pay a fine to the United States in the sum of $10,000.

* * *

MR. MORRISON: Well, Your Honor, permit us -- permit Mr. Greenman to be admitted to bail. It is our intention, if Your Honor please, to appeal, based on the Fifth Circuit line of cases that leads from the Grandinetti case, Your Honor, Shanahan, and about four or five other Fifth Circuit cases.

THE COURT: The request is denied, Mr. Greenman is committed to the custody of the Marshal at this time.

MR. MORRISON: Excuse me, Your Honor. Would Your Honor state the reasons for denying bail?

THE COURT: I don't think I need to. This is a convicted felon now, and I think frankly, would be a frivolous appeal. It may or may not be. But in any event, the burden, of course, shifts to the defendant to be entitled to bail, and he's come in and entered a plea of guilty, admitted his guilt. As far as I'm concerned, he should be immediately incarcerated to the Marshal.

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NOV 7 1983
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CLERK

No. 83-159

# In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS E. GREENMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioner is entitled to specific performance of a plea agreement when the sentencing court rejected the agreement and petitioner thereafter nevertheless pleaded guilty with full knowledge of an alleged breach of the agreement by the government.

2. Whether the district court failed to give impartial consideration to petitioner's submissions at the sentencing proceeding.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-159

DENNIS E. GREENMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 700 F.2d 1377.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1983 (Pet. App. 1a-11a). A petition for rehearing was denied on April 28, 1983 (Pet. App. 12a-13a). On June 23, 1983, Justice Powell extended the time for filing a petition for a writ of certiorari to July 27, 1983, and the petition was filed on that date (Pet. App. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Between 1977 and 1981, petitioner operated a criminal scheme that defrauded investors of millions of dollars (Pet. App. 2a; see Pet. 6). After surrendering to the authorities, petitioner entered into a plea agreement that required him to make restitution and to plead guilty to a single count of

causing a person to travel in interstate commerce in furtherance of a scheme to defraud investors of $5,000 or more, in violation of 18 U.S.C. 2314. In return, the agreement specified: "Defendant and the DOJ [Department of Justice] further agree that the DOJ shall make no recommendation as to the sentence, if any, to be imposed upon Defendant." The agreement also specified that "in the event the Court otherwise rejects this agreement, Defendant shall then be given an opportunity to withdraw his plea of guilty." This plea agreement began with the clause: "Defendant DENNIS E. GREENMAN and the UNITED STATES DEPARTMENT OF JUSTICE (DOJ) mutually agree as follows:". Pet. App. 32a-33a; Information.[1]

The United States District Court for the Middle District of Florida provisionally accepted petitioner's guilty plea, explicitly noting that it wished to review the presentence report before deciding whether to accept the plea agreement. During the presentence investigation, officials of the Securities and Exchange Commission wrote a letter to the court in which they described petitioner's offense and suggested that the court impose a sentence that would be sufficient for deterrent purposes. The letter did not suggest any specific sentence. Pet. App. 3a, 41a-42a.

After reviewing the presentence report, the district judge announced that he had decided to reject the plea agreement (Pet. App. 44a). He explained that he believed the government's decision to prosecute petitioner on only one count was too lenient and that he did not want to give that decision a "judicial imprimatur" (*id.* at 3a-4a, 45a). The district judge stated that he had read the SEC letter but added: "I had made the decision to reject the plea agreement

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[1]The one-page Information appears in the Record Excerpts filed in the court of appeals.

before I saw anything from the SEC" (*id.* at 46a-47a). The court offered petitioner an opportunity to withdraw his guilty plea (*id.* at 45a).

Petitioner sought a continuance and, two weeks later, moved to transfer the case to another judge. The district court denied the motion, explaining:

> [T]his plea agreement, as far as I'm concerned, has not been breached. It's clearly the intent of the U.S. Attorney only to bind the Department of Justice, and I don't think that carries forward to the Securities and Exchange Commission. And even if it did, they have not recommended any sentence.

Petitioner then explicitly declined to withdraw his guilty plea. Pet. App. 49a-50a, 57a-58a.

Before imposing sentence, the district court invited petitioner to correct errors in the presentence report. Petitioner's counsel referred to alleged inaccuracies in the SEC letter and noted his view that the letter should not have been considered by the court. The district judge then said: "I had made a decision to reject the plea agreement before even looking at [the letters] and had already made a decision as to what the sentence should be in this case if * * * the defendant decide[d] not to withdraw the plea of guilty." Pet. App. 49a-50a, 58a-60a; 1/28/82 Tr. 12-13, 15-25.

Following statements by petitioner's counsel and petitioner, the district court imposed the maximum sentence of 10 years' imprisonment and a fine of $10,000 (Pet. App. 60a-61a). The court explained its reasons for imposing this sentence (1/28/82 Tr. 26-27):

> I think [it] would be a mockery of justice if this Court were to enter a probated sentence of this man with the many victims who have suffered so much from the enormity of this crime.

> I really think it would hamper our judicial process and cause — it's the type of thing that would be one more nail in a breakdown of our judicial process. * * *
>
> But hopefully, it will be some message to someone else who will be in a similar position to Mr. Greenman that this cannot be allowed. Society is not going to allow it and if they commit acts such as this, they are going to be penalized severely by going to prison.

The court of appeals affirmed. It reasoned (Pet. App. 7a-8a):

> [Petitioner] chose to plead guilty while fully aware of the alleged breach of his plea bargain. * * * Therefore, [petitioner] cannot argue now that his guilty plea was conditioned on any unfulfilled promise of the prosecution. He entered his plea voluntarily and fully aware of all relevant circumstances and the possible consequences. We can find no support for the proposition that a broken plea agreement must be specifically enforced when the guilty plea was entered with knowledge of the alleged breach.

The court of appeals also rejected petitioner's contention that the district court was not impartial during the sentencing proceedings (*id.* at 9a-11a).

## ARGUMENT

1. a. It is entirely clear that the guilty plea on the basis of which petitioner was sentenced was entered voluntarily and intelligently. As the court of appeals noted, petitioner had a full opportunity to withdraw his earlier plea, and he made his decision not to do so knowing that the SEC letter was before the district court. Since the district court had rejected the plea agreement, it was unquestionably free to consider any government recommendations in sentencing petitioner. Indeed, when petitioner decided to adhere to his guilty plea,

he had far more knowledge about the sentencing judge's inclinations than most defendants have when they decide whether to plead guilty.

Petitioner nonetheless seeks relief on the ground that the government breached the plea agreement that was rejected by the district court. Petitioner's contention is without merit for several reasons.

First, as the district court found, the government did not violate the terms of the plea agreement in any way. It is apparent from the face of the agreement that it was carefully drawn to be between petitioner and the Department of Justice alone. Only the Department of Justice promised not to make a sentencing recommendation, and petitioner does not suggest that the Department made such a recommendation.[2]

Even if the agreement were not construed specifically to leave the SEC free to make a recommendation, the most that can be said is that there was no meeting of the minds on the question whether government agencies other than the Department of Justice could make recommendations to the sentencing court. That defect might have entitled petitioner to have the agreement rescinded — that is, to withdraw his plea, which he chose not to do — but it cannot entitle him to specific performance. In any event, the district court found that even the SEC letter was not a "recommendation as to the sentence" (Pet. App. 33a) within the meaning of the plea agreement.

Second, even assuming that the government breached the plea agreement, that agreement fell through not because of any action by the government but because the district court

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[2]Petitioner does not appear to contend that the SEC letter was written at the instigation of the Department of Justice; the court of appeals remarked that the letter was written "independently" (Pet. App. 3a).

decided not to accept it. "There is, of course, no absolute right to have a guilty plea accepted. *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); [Fed. R. Crim. P.] 11. A court may reject a plea in exercise of sound judicial discretion." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Here, the agreement specifically envisioned that the court might not accept its terms and provided that in such an event petitioner would be allowed to withdraw his plea. The district court exercised that power, and petitioner received the remedy provided by the agreement.

In short, petitioner was treated in a way prescribed by the agreement's terms. It is true that the district court had the SEC letter before it when it rejected the plea agreement, but the court twice specifically stated that it decided to reject the agreement before it had even read the letter. There is no reason to question these statements by the court. Nor does petitioner suggest that the SEC deliberately attempted to sabotage the plea agreement.

Third, even leaving aside the district court's rejection of the agreement, and assuming that the government did breach it, a district court ordinarily has discretion in choosing remedies for a breach; it can either require specific performance or allow the defendant to withdraw his plea, depending upon which course it considers appropriate. See *Santobello* v. *New York*, 404 U.S. at 263. At least in the absence of any detrimental reliance by the defendant, there is no reason to require a district court to choose specific performance. Since petitioner was allowed to withdraw his plea, he is not entitled to any further relief.

To be sure, petitioner claims (Pet. 9, 26) that he did rely on the agreement to his detriment by beginning to make restitution and by cooperating with the receiver appointed to aid in making restitution. But when the district court announced that it would reject the plea agreement, petitioner's counsel specifically represented that such actions were

*not* taken in reliance on the plea agreement. Petitioner's counsel first suggested to the court that detrimental reliance might have occurred because petitioner had already cooperated with the restitution program (Pet. App. 47a-48a), but this colloquy followed (*id.* at 48a):

> THE COURT: Well, if he was sincere in the letter that he wrote to the Court, he would want to do that in any event.
>
> [PETITIONER'S COUNSEL]: Well, there's no question that he wants to do that in any event.
>
> THE COURT: Then he hasn't been prejudiced that I can see.

Having thus represented to the court — presumably in the hope of being treated leniently — that he undertook these actions voluntarily, and not in reliance on the plea agreement, petitioner cannot now claim the opposite.

b. Petitioner asserts (Pet. 21-22) that the court of appeals' decision conflicts with *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). In *Cooper*, the government offered a plea agreement but attempted to withdraw its offer before the defendant had communicated his acceptance; the court ordered specific performance of the agreement. But the fact that the Fourth Circuit, in *Cooper*, ordered specific performance of what it considered an executory plea agreement when the government explicitly attempted to repudiate that agreement entirely, does not mean that the Fourth Circuit would order specific performance in the quite different circumstances presented by this case.

Moreover, in *Cooper* the defendant was denied the benefits of the supposed plea agreement solely because of the government's actions. Here, by contrast, petitioner would not have received the benefits of the plea agreement no matter what the government had done, because the district

court itself decided to reject the agreement. Cf. *United States* v. *Hammerman*, 528 F.2d 326, 332 (1975) (Fourth Circuit gave defendant opportunity to withdraw his plea, and declined to order specific performance, because specific performance would have required sentencing judge to agree to a certain sentence). We note that the court in *Cooper* explicitly "confin[ed its] holding as narrowly as we may" (594 F.2d at 19), emphasized the particular facts of that case, and expressly contemplated that there might be circumstances in which its approach could not be applied (*ibid.*). See also *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980) (declining to follow *Cooper*); *Johnson* v. *Mabry*, 707 F.2d 323, 328 (8th Cir. 1983), petition for cert. pending, No. 83-328 ("The holding in *Cooper* was very narrow").[3]

2. Petitioner also urges (Pet. 32-36) that the district court did not impartially consider the information he offered at the sentencing proceeding. The only basis for this contention is the district court's remark, when asked about the role the SEC letter had played in its decision, that "I had made a decision to reject the plea agreement before even looking at [the letter] and had already made a decision as to what the sentence should be in this case if * * * the defendant decide[d] not to withdraw the plea of guilty" (Pet. App. 59a-60a; see page 3, *supra*).

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[3]Petitioner cites a number of other cases in support of his position (Pet. 21-23), but as petitioner's own descriptions of these cases show, in none did a court of appeals hold that a district court was required to order specific performance as a remedy for a breach of a plea agreement by the government after the district court determined that giving the defendant an opportunity to withdraw his plea would be an adequate remedy. See, *e.g.*, *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978) ("Where a plea agreement has not been honored by the Government, the fashioning of an appropriate remedy is largely a matter of the exercise of the sound discretion of the court.").

The court of appeals was clearly correct in concluding that "[w]hen read as a whole, the record indicates that the disputed remark was merely a response to [petitioner's] assertion of improper influence by the SEC letters, and not an admission that the judge was unalterably predisposed to the sentence [petitioner] received" (Pet. App. 10a). As the court of appeals noted (*id.* at 11a), the district court reviewed all the relevant reports and gave petitioner and his counsel an opportunity to speak at length before imposing sentence. The court of appeals' ruling on this point plainly does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-159

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS E. GREENMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

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No. 83-159

DENNIS E. GREENMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# PETITIONER'S REPLY BRIEF

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## ARGUMENT

1. The central question presented by the Petition is whether a defendant who has fully performed his part of a written plea agreement, and has acted in reliance on it, is constitutionally entitled to require the Government to perform its commitments under the

agreement?* While the Government does not dispute the importance of the issue to the administration of the criminal justice system, nor the conflict between the Cooper v. United States, 598 F.2d 12 (4th Cir. 1979) and Government of Virgin Islands v. Scotland, 614 F.2d 360 (3d Cir. 1980) lines of authority (Pet. 20-26), it appears to suggest that the schism is not one of constitutional dimension because under Santobello v. New York, 404 U.S. 257 (1971), the district court "ordinarily has discretion in choosing remedies" for governmental

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* Citations to the Brief of the United States in Opposition are designated "Op. cert. ____" with appropriate page references. Citations to the Petition are designated "Pet. ___" with appropriate page references.

breach of a plea agreement (Op. cert. 6).* In fact, however, the conflict proceeds from opposing views as to whether there is a constitutional guarantee. One view finds a "constitutional right [to] be treated with fairness", Cooper v. United States, 594 F.2d 12, 16 (4th Cir. 1979), and, therefore, a "constitutional right to enforcement of a plea proposal . . . on the basis alone of reasonably formed expectations" without any showing of prejudice, 594 F.2d at

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* The Government also argues collateral factual issues, which were not considered by the Eleventh Circuit in concluding that petitioner was not entitled to specific performance. For example, it argues that the plea agreement bound only the Department of Justice and not the S.E.C. (Op. cert. 5). Counsel's request to the Sentencing Court for an evidentiary hearing on the issue was denied and the Eleventh Circuit effectively assumed that the S.E.C.'s letters were a breach of the agreement (Pet. 6a).

18;* another line finds no constitutional right to specific enforcement, at least absent a showing of unfairness or prejudice, (e.g. Government of Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980)); Pet. 23-25,** and a third view -- that of the Eleventh Circuit in this case -- holds, in effect, that there is no constitutional right to specific

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* Accord, Johnson v. Mabry, 707 F.2d 323, 326 (8th Cir. 1983), (petition for cert. pending, No. 83-328); ("constitutional right to enforcement of the plea bargain"); Ex Parte Yarber, No. 81-242 (Sup. Ct. Ala. March 1983) (per curiam) (same); cf. Hawaii v. Yoon, ___ Hawaii ___, 662 P.2d 1112, 1116 (Sup. Ct. Hawaii 1983) ("an unfulfilled plea agreement . . . implicates other considerations of constitutional dimension"); Pet. 21-22.

** There was prejudice here, contrary to the Government's argument (Op. cert. 6-7). Simply because a defendant "wants to" make a clean breast of his guilt or make restitution does not mean that he will do so in the absence of an acceptable plea bargain agreement.

enforcement in any circumstances.*

The Cooper court would not have denied specific enforcement in our case, as the Government implies (Op. cert. 7). As in Cooper, petitioner here was denied the benefits of a plea agreement because of the Government's conduct. The Government's reliance on the Sentencing Court's

---

* The Eleventh Circuit refused to find any prejudice either in Petitioner's restitutionary payment of virtually all of his assets ($1.7 million) or in his Fifth Amendment waiver. If those acts do not constitute prejudicial reliance, it is hard to imagine what could. Further, under the Eleventh Circuit's circular reasoning, any defendant's rights to specific performance could be cut off if he refused an offer to withdraw his plea after breach by the Government. His assertion of his rights would then be deemed a re-pleading which, since it followed the breach, would be viewed as a "voluntary" plea and hence a waiver of his right to specific performance. This "assertion equals waiver" formulation appears to be limited to the Eleventh Circuit.

improper rejection of the plea agreement,* a rejection which was, in any event, disregarded by the Eleventh Circuit (Pet. 6a), is misguided because it implies that Petitioner had bargained for action by the Court. (Cf. United States v. Hammerman, 528 F.2d 326, 332 (4th Cir. 1975)). But, as in Cooper, Petitioner "bargained" for conduct by the Government -- its silence -- and the Government failed to perform. In the circumstances, Santobello presumes a constitutional impact on the sentencing environment. 404 U.S. at 262-63.

2. With regard to Petitioner's claim that the Sentencing Court was not impartial, the Government's brief does no more than repeat the words of the

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* Fed. R. Crim. P. 11(e) was amended in 1979 to eliminate the court's power to reject "type B" plea agreements such as the one at issue here.

Eleventh Circuit in concluding that the Sentencing Court's admission that he "had already made a decision as to what the sentence should be" before any allocution (Op. cert. at 9) was "merely a response to [Petitioner's] assertion of improper influence" (id; Pet. 10a). The problem with the Government's approach, and that of the Eleventh Circuit, is that it requires that we accept the Sentencing Court's statement for one purpose, but not for another. Compare Op. cert. 6 with Op. cert. 9. But if we must accept the statement as true in order to establish the Sentencing Court's freedom from influence by the S.E.C. -- because he had already decided on a sentence -- then we must accept it (absent some intervening circumstance) as a demonstration that his mind remained closed, thus denying Petitioner the required impartiality.

## Conclusion

For these reasons, and those set forth in the petition, we respectfully request that this Court grant the petition for a writ of certiorari.

Dated: New York, New York
November 14, 1983

Respectfully submitted,

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